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Supreme Court, U.S.
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No. 99-49

In the

Supreme Court of the United States

October Term, 1998

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES

NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioner Carolyne Cleary submits this brief in reply to the briefs in opposition filed by New Jersey state officials ("State Respondents"), New Jersey Association of Health-Care Facilities ("NJAHCF"), and New Jersey Association of Non-Profit Homes for the Aging ("NJANPHA")(where appropriate, collectively referred to as "Respondents").[1]

I. THIS COURT'S PRIOR DENIAL OF A PETITION FOR WRIT OF CERTIORARI REFLECTS NO EXPRESSION OR VIEW OF THE MERITS OF THIS CASE.

Respondents first argue that the instant writ should be denied since this Court declined to review a case in which the application of subsection (e)(2)(C) of the spousal impoverishment provisions of the Social Security Act, 42 U.S.C. §1396r-5 *et seq.*, was similarly at issue.[2]

This Court's prior denial of a Petition for Writ of Certiorari is irrelevant. The Court has made it uncompromisingly clear that the denial of a writ of certiorari carries no implication or inference concerning its view of the merits of a

[1] Carolyne Cleary's institutionalized spouse, Petitioner Thomas J. Cleary, passed away on May 8, 1999. Consistent with the demographic data for this population presented for this Court's consideration in the instant Petition, Mrs. Cleary outlived her husband. In accordance with New Jersey's income first rule, she spent approximately $168,000 before Mr. Cleary became eligible for medical assistance on August 1, 1997.

[2] *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S.Ct. 408, 142 L.Ed. 2d 331 (1998). NJANPHA accuses Petitioner of "intentionally trying to hide the fact that this Court already passed on the question", (Resp. 1), and, supposedly presuming such a feat to be possible, "hiding this Court's disposition of *Chambers*." Resp.4. Respondent's assumptions are incorrect. The lack of acknowledgment of *Chambers* history in this Court in the citations to that case was an oversight for which the undersigned assumes responsibility.

case. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973)(referring to Justice Frankfurter's statements regarding the denial of certiorari in *Maryland v. Baltimore Show*, 338 U.S. 912, 917-918 (1950); *United States v. Carver*, 260 U.S. 482, 490 (1923). Among other reasons, a petition may be denied for lack of accuracy, brevity and clarity. S.Ct. R. 14.4. Indeed, the Court "may well take the very next case raising the same question and reach a different result on the merits." Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 402-03 (1960).

The irrelevancy of Respondents' argument notwithstanding, Petitioner points out that Petitioners in *Chambers* presented four questions for review, thereby submitting to this Court a case or controversy quite dissimilar from the instant petition.

State Respondents argue that nothing has occurred since the Court's denial of certiorari in the Sixth Circuit case that would be of significance to the Court in it consideration of the instant request. Petitioners reply that the petition speaks adequately for the importance of the question presented.

II. PETITIONER'S ARGUMENT REGARDING THE UNIFORMITY OF THE LAW WAS PROPERLY RAISED.

NJANPHA states that Petitioner improperly raised the argument that Congress intended to impose a single uniform method for allocating additional assets to the community spouse, since allegedly it was never raised in the Court of Appeals. Respondent is wrong. The undersigned counsel of

record raised this argument before the Court of Appeals at the oral argument on January 27, 1998. In addition, Petitioner's lead argument in her Petition for Rehearing and Rehearing En Banc, timely filed in the Court of Appeals, was that the panel's holding "destroys the uniform national spousal protection policy that Congress intended...." Pet.Reh. 3-4.

III. THE MEDICAID PROGRAM IN GENERAL AND THE SPOUSAL IMPOVERISHMENT PROVISIONS SPECIFICALLY DO NOT ALLOW FOR THE VARIANCE POSTURED BY RESPONDENTS.

Petitioners urge this Court to recognize Respondents' mischaracterizations of the variations allowed individual States in conducting their Medicaid programs. State Respondents, who find the single subsection at issue in this case too "complex" to be accorded plain meaning, now nonchalantly pronounce without substantiation that "the vast majority of all Medicaid benefits provided are optional and the States are afforded a great deal of discretion...." Resp. 10-11 (emphasis added).

The parameters for the application of State Medicaid programs are set forth in excruciating detail at 42 U.S.C. §1396a(a)(1)-(65). This is hardly a program of unfettered choices. Where there are options, they are expressly granted. Equally express is the lack thereof. As examples, (I) a State plan for medical assistance must provide for making medical assistance to individuals who are "qualified pregnant women or children as defined in section 1905(n)";[3] (ii) must provide "for the inclusion of home health services for any individual

[3] §1396a(a)(10)(A)(I)(III).

who, under the State plan, is entitled to nursing facility services";[4] while (iii) a State plan must provide "at the option of a State, for making medical assistance available for COBRA premiums..."[5]

Adherence to the spousal provisions is not optional. A State plan for medical assistance "must meet the requirements of section 1924 [42 USCS §1396r-5](relating to protection of community spouses)." §1396a(a)(51)(emphasis added)(brackets and parenthetical in original). The options granted within that section are expressly stated. As State Respondents correctly note, the spousal provisions do allow for differences among the States - but these options are expressly provided. Specifically, States are allowed to choose higher minimum standard amounts for the spousal resource share and the minimum monthly maintenance needs allowance - a generous adjustment. Nowhere within the spousal provisions is there an option to give lesser than the minimum set by the law. Moreover, section (e)(2)(C) allows for no discretion in its application, as borne witness to by the litigation spawned in the wake of the individual States' substantively disparate applications of this law.[6]

NJAHCF argues that the availability of New Jersey's income first rule, "along with the discretion to establish the allowances..., maximizes the ability of each state to fashion and implement, again within circumscribed limits, Medicaid rules and regulations in order to protect community spouses while preventing couples from manipulating the Medicaid

[4] §1396a(a)(10)(D).

[5] §1396a(a)(10)(F)(emphasis added).

[6] State Respondents incorrectly assert that States have discretion in determining whether a community spouse is entitled to certain "excess shelter" costs in determining the MMMNA. Resp. 6. *See* 42 U.S.C. §1396r-5(d)(3) and (4). The law speaks for itself.

program...." Resp.6 (emphasis added). This is a bogus argument since there are no circumscribed limits in section (e)(2)(C) within which to apply discretion and Congress did not create in the spousal provisions a process whereby States could "fashion" rules and regulations. As a condition of participation in the Medicaid program, States must meet the requirements of §1396r-5 relating to the protection of community spouses. §1396a(a)51. That is the State's responsibility and mission with respect to these provisions. Congress itself attended to the safeguard of the Medicaid program as relates to the instant issue by providing for additional resources, if necessary at all, in an amount circumscribed by a formulaic determination of the specific income needs of the community spouse.

State Respondents contend that the fair hearing mechanism for adjusting the standard resource allowance, (section (e)(2)(C), is a shining example of the opportunity for discretionary application of the law. The language of section (e)(2)(C) is very clear. If a community spouse establishes that her income, combined with the income generated by the standard resource allowance, is insufficient to provide the income entitlement (MMMNA), then "there shall be substituted for the community spouse resource allowance under (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance." §1396r-5(e)(2)(C)(emphasis added). The discretion of which State Respondents speak is not there.

Indeed, in "resource first" States, there is variation in the methodology used to determine the exact amount of resources needed to generate the additional income for the community spouse who establishes her need at a fair hearing. For example, in the Commonwealth of Pennsylvania and the

State of Illinois, the administrative agency determines the community spouse's income "shortfall" and then increases the standard resource share by an amount that is equal to the cost of a commercial annuity that will provide that shortfall, based on the life expectancy of the community spouse. Such a procedure satisfies the statutory language and spirit of the spousal provisions.

IV. THE APPLICATION OF A UNIFORM NATIONAL SPOUSAL PROTECTION PLAN THAT APPLIES IN ALL STATES DOES NOT RENDER SECTION (e)(2)(C) SUPERFLUOUS.

State Respondents contend that a uniform application of the law would render the provision at issue superfluous. Once again, State Respondents evidence a misunderstanding of the Medicaid law, by suggesting that Congress could have accomplished what Petitioners urge by merely defining the "standard resource allowance as that amount needed to bring the community spouse's own monthly income up to the minimum monthly need amount." Resp.12.

State Respondents' error is that the community spouse's resource allowance was not established only to generate income for the community spouse. Section 1396r-5(c) provides the rules for the treatment of resources. A community spouse is allocated one-half of the total resources of the couple, up to a maximum amount that changes annually.[7] All community spouses, regardless of their income, receive this allocation. Thus, a community spouse earning $50,000

[7] As noted earlier, the statute grants States discretion to use the maximum figure rather than the one-half as the standard share (a more generous allowance).

annually, as well as her counterpart receiving only a modest Social Security payment, receives this grant. This is absolutely clear in the law and, to the best of the information, knowledge and belief of the undersigned, is faithfully implemented throughout the land. -

In addition, Congress recognized that those community spouses with limited income should have additional resources. Accordingly, a formula for determining a minimum income amount was included in the statute and those community spouses whose own income is below that amount are entitled to more than the standard share. The fair hearing is the forum in which the community spouse is given the opportunity to establish her need and additional resources are then allocated. It is that adjusted resource share that is tied to income and only those community spouses with limited income of their own are entitled to the adjusted share. Accordingly, State Respondents' suggestion that had Congress intended the resource first rule, it could have simply defined the standard share as that which would provide a community spouse with a minimum monthly need is without merit.

CONCLUSION

As discussed above, this Court's decision to decline to review a case in which the "resource first/income first" rules were similarly at issue should be of no significance in any interpretation of the merits of the instant matter. The accuracy of that conclusion notwithstanding, Petitioner respectfully urges this Court to heed the concerns expressed by Justice Black, dissenting in *Simmons v. Union News Co.*, 382 U.S. 884, 886 (1965):

> While we often say that nothing is decided by a denial of certiorari, all of us know that a denial of certiorari in this case, following the denial of certiorari in the ... [earlier] case, will undoubtedly lead people to believe, and I fear with cause, that this Court is now approving such a forfeiture of contractual claims....

Id. Analogously, a denial of the instant request for review may serve to foster the mistaken belief that this Honorable Court approves of the application of the statute at issue as now practiced in the Defendant State of New Jersey.

For all of the foregoing reasons, Petitioner reasserts her request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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